No. 12,489

IN THE

United States Court of Appeals

For the Ninth Circuit

ARTHUR NEWAGON,
Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below", denying appellant's petition for writ of habeas corpus. (Tr. 60.) The Court below had jurisdiction over the habeas corpus proceedings under Title 28 U.S.C.A. Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by Title 28 U.S.C.A. Section 2253.

STATEMENT OF THE CASE.

The appellant, an inmate of the United States Penitentiary, at Alcatraz, California, filed a petition for writ of habeas corpus, in which he alleged, in substance, that his detention by the appellee, the warden of the said prison, is illegal because his counsel was not present at the time the jury returned its verdict convicting him of the crime of murder on an Indian Reservation. (Tr. 1-18.) Thereafter the Court below issued an order to show cause (Tr. 19), and the appellee filed a return to order to show cause. (Tr. 20-59.) The matter was submitted and the Court below filed the following order denying the petition for writ of habeas corpus:

> "For the reason that there is no jurisdictional infirmity reachable by the writ of habeas corpus presented and upon the authority of Lovvorn v. Johnston, 9 Cir. 118 Fed. 2d 704, cert. den. 314 U.S. 607, the petition for the writ of habeas corpus is denied.
>
> Dated: December 28, 1949.
>
> Louis E. Goodman
> United States District Judge."
>
> (Tr. 60.)

From this order appellant now appeals to this Honorable Court. (Tr. 64.)

QUESTION.

Does the complaint of appellant constitute a jurisdictional infirmity reachable by the writ of habeas corpus?

CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

ARGUMENT.

In denying the petition for writ of habeas corpus the Court below did so upon authority of the decision of this Honorable Court in the case of

Lovvorn v. Johnston, 118 F. (2d) 704, certiorari denied, 314 U.S. 607.

Appellee herein asks this Honorable Court to affirm the order of the Court below upon authority of this same case.

In the *Lovvorn* case, supra, this Court held that the trial Court did not lose jurisdiction where counsel had absented himself at the time the verdict of guilty was returned against the defendant, even though such absence was without the consent of the Court or of the defendant.

See also,

Kent v. Sanford (CCA-5), 121 F. (2d) 216, certiorari denied, 315 U.S. 799,

and

Altmayer v. Sanford (CCA-5), 148 F. (2d) 161,

on which appellee herein also relies, although, at the time the verdict was returned in the former case, counsel absented himself with the consent of the Court, and in the latter proceeding, before a general court-martial, civilian counsel absented himself with the consent of the defendant, while appointed military counsel remained in attendance.

Appellee knows of no decision squarely in point contrary to the rule enunciated by this Court in the *Lovvorn* case, supra, although in

Thomas v. Hunter (CCA-10), 153 F. (2d) 834,

cited by appellant in his opening brief, there is a strong indication that failure of counsel to be present at the time the verdict was returned might be considered a jurisdictional defect cognizable in habeas corpus. For the ultimate result in this latter case, see

Thomas v. Hunter (CCA-10), 163 F. (2d) 1021,

and

Hunter v. Thomas (CCA-10), 173 F. (2d) 810.

Appellant also cites the decision of this Honorable Court in

Wilfong v. Johnston, 156 F. (2d) 507,

but this case involved only the absence of counsel at the time sentence was pronounced. The *Wilfong* case, supra, therefore, can not and should not be construed as overruling the decision in the *Lovvorn* case, supra. Appellee earnestly asserts this proposition, particularly in view of the obvious difficulty that the Government would have if it were compelled at this late

date to re-try the appellant, who was convicted by a jury in 1934, and whose timely motion for a new trial on the same ground urged herein was denied by the trial Court. In this connection attention is called to the fact that no such difficulty befell the Government in the *Wilfong* case, supra, where the petitioner was remanded for re-imposition of sentence and for any proceedings which normally follow thereafter.

Appellant herein also relies on

Johnson v. Zerbst, 304 U.S. 458;
Powell v. Alabama, 287 U.S. 45;
Tomkins v. State of Missouri, 325 U.S. 485;
Williams v. Kaiser, 323 U.S. 471; and
Von Moltke v. Gillies, 332 U.S. 708.

Appellee, of course, has no quarrel with these decisions and leaves these cases with the passing observation that they, too, in nowise can be construed as overruling the decision of this Court in the *Lovvorn* case, supra, as can not Rule 44 of the Federal Rules of Criminal Procedure, also cited herein by the appellant.

In closing this argument, appellee observes that while the appellant claims he was only 14 years of age at the time he was convicted in 1934, the record of court commitment at Alcatraz, incorporated as an exhibit in the return to order to show cause (Tr. 58), shows that he was born in 1913, and thus was either 20 or 21 at the time he was convicted. But, whether appellant was 14, or 20, or 21 at that time, appellee believes, as the Court below found, on au-

thority of a decision of this Honorable Court, that the absence of counsel at the time the verdict was returned was not a jurisdictional infirmity cognizable in habeas corpus.

Thus, appellee asks this Honorable Court to reaffirm the position which it took in the case of *Lovvorn v. Johnston,* supra, a decision which, it goes without saying, was the correct and proper one.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the decision of the Court below is correct and should be affirmed.

Dated, San Francisco, California,
April 26, 1950.

Respectfully submitted,

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Attorneys for Appellee.